Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
	)	
Petitions for Declaratory Ruling Regarding Intercarrier Compensation for Wireless Traffic	)	DA 02-2436

COMMENTS
of the
ORGANIZATION FOR THE PROMOTION AND ADVANCEMENT OF SMALL TELECOMMUNICATIONS COMPANIES

OPASTCO
Stuart Polikoff
Stephen Pastorkovich
21 Dupont Circle, NW
Suite 700
Washington, DC 20036

202-659-5990

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SUMMARY

The CMRS Petitioners' request for the Commission to declare wireless termination tariffs to be unlawful has no legal basis and should therefore be denied. At the same time, the Commission should affirm that wireless termination tariffs are lawful in the absence of negotiated or arbitrated agreements, as they are nothing more than a means to allow rural incumbent local exchange carriers (ILECs) to obtain the just and reasonable rates for interconnection called for by the Telecommunications Act of 1996 (the Act). The Act establishes voluntary negotiations as the preferred method for establishing reciprocal compensation arrangements between carriers. But, the Act is clear that the responsibility for initiating such negotiations lies with the requesting carrier, not the ILEC as the Petitioners suggest. Thus, the Missouri Public Service Commission (MO PSC) has recognized that tariffs are not unlawful in the absence of a reciprocal compensation arrangement. Even assuming that the responsibility for initiating negotiations could be placed with rural ILECs, the nature of indirect interconnections prevent the ILEC in many cases from being able to trace the origin of traffic that is received through a tandem switch.

The CMRS Petitioners claim that rural carriers have filed wireless termination tariffs to bypass the negotiating process. To the contrary, tariffs are filed to encourage negotiation. It is quite telling that the CMRS Petitioners assert that it is often not worth the time and expense for them to negotiate reciprocal compensation arrangements with rural ILECs. If entering into negotiations is not a worthwhile undertaking for large wireless providers, then wireless termination tariffs should be available as a default so that rural ILECs can receive the just and reasonable compensation called for by the Act

for the termination of traffic on their networks. There is no basis in the Act or the Commission's rules to make bill-and-keep the default arrangement, as the CMRS Petitioners imply.

Finally, the Commission should clarify that LECs are entitled to access charges from IXCs for the provision of access services on all interexchange calls originating from, or terminating on, the networks of commercial mobile radio service (CMRS) providers. As US LEC notes, there is no dispute that the access charge regime applies to all calls between two LECs that involve an interexchange carrier (IXC), and there should not be a different set of rules merely because one end of a call involves a CMRS provider. In either situation the rural LEC is performing access services for the IXC and is entitled to receive lawful compensation and cost recovery for such services. The CMRS Petitioners assert that intra-Major Trading Area (MTA) calls between a LEC and a CMRS provider that involves an IXC should be subject to the reciprocal compensation rules. However, the Commission determined when it promulgated its interconnection rules that it had no intention of disrupting existing practices under the access charge regime. Therefore, to be technologically consistent, the Commission should affirm that in the case of any call involving a rural LEC and a CMRS provider that passes through an IXC, the call is subject to the access charge regime.

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I. Introduction

The Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) hereby submits these comments in response to the Federal Communications Commission's (Commission or FCC) Public Notice[1] seeking comment on the Petition for Declaratory Ruling filed on September 6, 2002 by T-Mobile USA, Inc., Western Wireless Corp., Nextel Communications, Inc. and Nextel Partners, Inc. (CMRS Petitioners); and the Petition for Declaratory Ruling filed by US LEC Corp. (US LEC) on September 18, 2002. OPASTCO is a national trade association representing over 500 small telecommunications carriers serving rural areas of the United States. Its members, which include both commercial companies and cooperatives, together serve over 2.5 million customers. All OPASTCO members are

[1] *Comment Sought on Petitions for Declaratory Ruling Regarding Intercarrier Compensation for Wireless Traffic*, CC Docket No. 01-92, Public Notice, DA 02-2436 (rel. Sept. 30, 2002).

rural telephone companies as defined in 47 U.S.C. § 153(37). Roughly one-half of OPASTCO members also provide wireless service to consumers.

II. Wireless termination tariffs are a lawful default method of establishing just and reasonable compensation rates for rural ILECs in the absence of a negotiated interconnection agreement

The CMRS Petitioners acknowledge that they have achieved indirect interconnection with rural ILECs.[2] The Act calls for "just and reasonable" rates for interconnection that are based on cost and may include a reasonable profit.[3] Obviously it is not "just and reasonable" for CMRS providers to obtain interconnection to rural ILECs' facilities for free, unless such an arrangement is properly negotiated or arbitrated under the auspices of the Act.[4]

Thus, in order to receive lawful compensation for the termination of traffic on their networks in the absence of an agreement, a number of rural ILECs filed wireless termination tariffs with their respective state commissions. The MO PSC, in the course of its duty to examine tariff filings, correctly determined that there is no barrier to such tariffs in the Act, or in the FCC's rules. Specifically, the MO PSC stated that:

> [I]t is apparent from the [1996] Act that reciprocal compensation arrangements are a mandatory feature of agreements between the CMRS carriers and the small LECs. However, the record shows that at present there are no such agreements between the parties to this case. The Act does not state that reciprocal compensation is a necessary component of the tariffs of LECs or ILECs. Therefore, the Commission concludes that Section 251(b)(5) of the Act simply does not apply to the proposed tariffs herein at issue. For the same reason, **the Commission concludes that the proposed tariffs are not unlawful under Section 251(b)(5) of the Act**.[5]

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[2] CMRS Petition, p. 4.

[3] 47 U.S.C. § 252(d)(1).

[4] 47 U.S.C. § 252(a), (b).

[5] MO PSC, *In the Matter of Mark Twain Rural Telephone Company's Proposed Tariff to Introduce Its Wireless Termination Service*, Case No. TT-2001-139, p. 29 (issued Feb. 8, 2001) (MO PSC decision) (emphasis added); *see also*, p. 32: "[Wireless termination] tariffs are not unlawful pursuant to Section

The Act calls for voluntary negotiations in the first instance to establish interconnection arrangement among carriers.[6] The CMRS Petitioners attempt to misrepresent the Act's language by shifting the responsibility for initiating interconnection negotiations from themselves to rural ILECs. They claim that they are willing to negotiate with rural ILECs, but only if the ILECs submit requests for such negotiations.[7]

However, the CMRS Petition contradicts itself in this respect by acknowledging that the Commission's rules recognize that wireless licensees must submit interconnection requests to ILECs.[8] Furthermore, the plain language of the Act repeatedly states that the responsibility to make requests for interconnection lies with the entity that desires interconnection with the ILEC's facilities. For example, Section 251(c)(2) discusses the interconnection obligations of incumbents, noting that ILECs have certain duties towards *requesting* telecommunications carriers. Similarly, Section 252(a)(1) states that an incumbent may enter into negotiations and binding agreements with *requesting* telecommunications carrier(s). The CMRS Petition itself[9] cites Section 332(c) of the Communications Act, as amended, which requires common carriers to establish physical connections with CMRS providers "upon reasonable request."[10] The Commission's rules continue to reflect the plain language of the Act, indicating that those

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252(d) of the Act or the F.C.C.'s regulations implementing and interpreting that section of the Act."

[6] 47 U.S.C. § 252(a)(1).

[7] CMRS Petition, pp. 4, 7.

[8] *Ibid.*, p. 10 (citing 47 C.F.R. § 20.11(a)).

[9] CMRS Petition, p. 9, fn. 18.

[10] 47 U.S.C. § 332(c)(1)(B).

carriers desiring interconnection with an ILEC's facilities must submit a request.[11] The CMRS Petition's attempt to shift this responsibility to rural ILECs is an attempt to defy the Act and the Commission's rules.

Even assuming, *arguendo,* that the responsibility to initiate negotiations is, or could be, placed with rural ILECs, the very nature of indirect interconnections usually prevent rural ILECs from knowing which CMRS providers they should contact regarding wireless-originating traffic that rural ILECs are terminating *gratis*. Traffic originating with CMRS providers reaches rural ILECs through IXCs and/or a tandem switch operated by another entity (often a regional Bell operating company).[12] It is often not possible for rural ILECs to trace the origin of traffic that it receives through a tandem. Even where the technical capability exists, IXCs or tandem operators are often reluctant to undertake the effort to provide records that would allow rural ILECs to even know which CMRS providers are originating the traffic. Thus, rural ILECs do not know which carriers the CMRS Petition would have them approach in order to request negotiations.

Therefore, as a practical matter, as well as a matter of law, it is the CMRS carriers who must initiate contact and request interconnection with rural ILECs in order for *both* parties to negotiate in good faith. In the absence of a request from the CMRS provider to negotiate an interconnection arrangement, a rural ILEC often has no other means than a tariff to recover its costs of terminating traffic. Accordingly, the CMRS Petition should be denied, and the Commission should affirm that wireless termination tariffs are lawful in the absence of negotiated or arbitrated agreements, as they are nothing more than a

[11] 47 C.F.R. §§ 51.703(a), 51.715(a).

[12] *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd, 9610, 9643, para. 91 (2001).

means to allow rural ILECs to obtain the just and reasonable compensation called for by the Act.

III. Wireless termination tariffs would be unnecessary if CMRS providers would negotiate in good faith with rural ILECs as required by the Act and the Commission's rules

In addition to allowing rural carriers to recover their costs and obtain a fair rate for interconnection, wireless termination tariffs serve to *encourage* the negotiation process clearly envisioned by Sections 251 and 252 of the Act. The CMRS Petitioners claim that rural carriers have filed such tariffs to *bypass* the negotiating process is demonstrably false, as the rural ILECs' tariffs explicitly defer to negotiated agreements and rural ILECs have willingly entered into good-faith negotiations with CMRS providers who have made such requests.[13] Indeed, it is quite telling that the CMRS Petitioners assert that it is often not worth the time and expense for them to negotiate reciprocal compensation arrangements with rural ILECs, all for what they dismiss as a "small volume of traffic."[14] However, wireless traffic that large, national companies consider to be a "small volume" is a significant – and growing – portion of all traffic carried by small, rural telephone companies. If entering into negotiations with rural carriers is not a worthwhile undertaking for large wireless providers, then wireless termination tariffs should be available as an option to allow these carriers to avoid such activities. Each CMRS provider should make the business decision of whether to abide

[13] The CMRS petition at pp. 8-9 makes a last-ditch effort to justify its position by citing FCC decisions against tariffs that were made years prior to the Act's passage. Obviously, the language of the 1996 Act is controlling and supercedes inconsistent regulatory decisions made prior to its enactment. Notably, the duty to negotiate and provisions for mandatory arbitration were not encoded into law prior to the 1996 Act, undercutting the CMRS Petitioners' arguments. Even if the old decisions in question could survive the Act's passage, the CMRS Petition's claim that tariffs diminish their "limited bargaining power" at p. 10 clearly refers to tariffs filed by large ILECs. Large CMRS providers have far more bargaining power than rural ILECs.

by the tariffed rate, or request negotiations, based upon its own particular circumstances. Either way, rural ILECs have a legal right to receive just and reasonable compensation for the termination of traffic on their networks.

In its examination of wireless termination tariffs, the MO PSC not only found that such tariffs were lawful, as noted above, but also made several other significant, accurate findings. First, the MO PSC noted that both CMRS carriers and rural ILECs agreed that rural ILECs "are entitled to receive compensation for the termination of wireless-originated traffic."[15] Second, the MO PSC found that both parties agreed that "CMRS carriers can compel the small LECs to make an agreement, but the small LECs cannot compel the CMRS carriers to make an agreement."[16]

Third, because CMRS providers currently depend on rural ILECs to terminate calls without compensating the ILEC, the MO PSC accurately found that there is "no incentive for [CMRS] carriers to enter into agreements with the small LECs."[17] OPASTCO notes that CMRS providers are also disinclined to enter into agreements with rural ILECs because large wireless carriers are terminating far more traffic on rural ILECs' facilities than rural ILECs terminate on wireless facilities. This imbalance leads CMRS providers to favor a bill-and-keep regime which allows them to avoid fair reciprocal compensation arrangements.

Finally, the MO PSC correctly determined that cost-based wireless termination tariffs created an incentive "for the CMRS carriers to do what Congress expects them to

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[14] CMRS Petition, p. 4.
[15] MO PSC, p. 19.
[16] *Id.*, p. 46. Because CMRS carriers are not ILECs, they are not subject to ILECs' § 251(c)(1) obligation to respond to requests for negotiations.
[17] *Id.*, p. 19.

do, namely, negotiate agreements with the small LECs."[18] Therefore, if CMRS providers are not satisfied with the terms of wireless termination tariffs, they are free to request negotiations, which small ILECs must enter into in good faith. If CMRS carriers cannot achieve satisfactory results through negotiations, the MO PSC accurately noted that rural ILECs "are subject to mandatory arbitration under the Act"[19] and that CMRS carriers have the option to "take advantage of these provisions of the Act."[20] Thus, because wireless termination tariffs serve to encourage negotiations for interconnection arrangements as Congress envisioned, the CMRS Petition should be denied, and the Commission should affirm the lawfulness of such tariffs in the absence of negotiated or arbitrated agreements.

IV. The CMRS Petition inaccurately portrays bill-and-keep as the default arrangement in the absence of negotiated agreements

The CMRS Petitioners attempt to portray the negotiation of interconnection agreements as an action that should take place only if "either party seeks to change the *status quo*."[21] Because they prefer the *status quo* which enables them to achieve free indirect interconnection with rural ILECs, their Petition implies that the Act and the Commission's rules establish bill-and-keep as the default arrangement in the absence of negotiated agreements.[22] Of course, the reality is that the Act contains no hint of such a provision, and the Commission's rules place clear limits on the circumstances under which bill-and-keep might apply. Bill-and-keep is explicitly addressed in Section 51.713 of the Commission's rules, and the plain language of this section in no way imposes bill-

[18] *Id.*, pp. 45-46.
[19] *Id.*, p. 29. *See also*, 47 U.S.C. § 252(b).
[20] *Id.*, p. 30.
[21] CMRS Petition, p. 10.

and-keep in the absence of an agreement. State commissions have the *option* of imposing bill-and-keep under Section 51.713, but *only* if the state commission has made a determination, or has established a rebuttable presumption, that traffic flow is "roughly balanced" between the two carriers in question. Rather than being the default arrangement, bill-and-keep situations only comport with the Act when they are explicitly agreed to by the carriers involved or are actively imposed by state commissions following established procedures. The Commission should therefore affirm that CMRS providers that do not wish to accept tariffed rates must request negotiations with rural ILECs as called for by the Act, and may not rely on a default bill-and-keep regime.

V. The Commission should affirm that traffic between LECs and CMRS providers that is transmitted through an IXC is subject to the access charge regime in all cases

The Commission should clarify its rules by affirming that LECs are entitled to recover access charges from IXCs for the provision of access service on all interexchange calls originating from, or terminating on, the networks of CMRS providers. As US LEC explains, there would be no dispute that, if a call originated or terminated with another landline LEC, and an IXC was involved, access charges would apply.[23] Thus, there should not be a different set of rules that apply when the other originating or terminating carrier happens to be a CMRS provider. It is irrelevant to a rural LEC whether the carrier on the other end of the call is a wireline LEC or a CMRS provider. In either situation, the rural LEC is performing transport and origination/termination services for the IXC, and the LEC is entitled to lawful compensation and cost recovery for such services from the IXC.

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[22] *Id.*, pp. 3, 10.

The CMRS Petitioners assert that an ILEC's use of the access charge regime for calls with CMRS providers in certain instances is inconsistent with the Commission's rules and should be governed by reciprocal compensation.[24] The Petitioners allude to the Commission's rules which state that transport and termination rates under Section 251(b)(5) of the Act apply to traffic exchanged between a LEC and a CMRS provider that originates and terminates within the same MTA.[25] While the rule does not directly address traffic that is carried by an IXC, the Commission did clarify in the First Report and Order in the *Local Competition* proceeding that it had no intention of disrupting existing practices under the access charge regime, which allows for access charges to be paid whenever an IXC is involved in the transport of a call. Specifically, the Order states:

> Under our existing practice, most traffic between LECs and CMRS providers is not subject to interstate access charges **unless it is carried by an IXC**, with the exception of certain interstate interexchange service provided by CMRS carriers, such as some "roaming" traffic that transits incumbent LECs' switching facilities, which is subject to interstate access charges. **Based on our authority under section 251(g) to preserve the current interstate access charge regime**, we conclude that the new transport and termination rules should be applied to LECs and CMRS providers so that CMRS providers continue not to pay interstate access charges for traffic that currently is not subject to such charges, **and are assessed such charges for traffic that is currently subject to interstate access charges**.[26]

Unlike large ILECs, rural ILECs' service territories often do not contain tandems that allow direct interconnection with CMRS networks. This is why IXCs must often be

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[23] US LEC Petition, p. 2.

[24] CMRS Petition, pp. 3-4, fn. 8; p. 5, fn. 12.

[25] 47 C.F.R. § 51.701(b)(2).

[26] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 95-185, FCC 96-325, para. 1043 (rel. Aug. 8, 1996) (emphasis added).

utilized to bridge the gap between a rural LEC and CMRS providers, even those that may fall within the same MTA. If Commission policy and rules are to be technologically consistent, it should not make any difference whether traffic exchanged between a rural LEC and an IXC has a landline LEC or a CMRS provider at the other end. In either case, the rural LEC is handling IXC traffic, not CMRS traffic or another LEC's traffic. The rural LEC providing access service should then be compensated via lawful access charges. Therefore, the Commission should affirm that in the case of any call involving a rural LEC and a CMRS provider that passes through an IXC, the call is subject to the access charge regime and the rural LEC is entitled to receive just and reasonable access compensation from the IXC for its access services.

VI. Conclusion

Rural ILECs are lawfully entitled to compensation for CMRS-originated calls that terminate on the ILEC's network. The Commission should therefore deny the CMRS Petitioners' request to find that rural ILECs' wireless termination tariffs are unlawful. In the process, the Commission should affirm that CMRS carriers have an obligation to provide just and reasonable compensation to rural ILECs, and that in the absence of negotiated or arbitrated agreements, wireless termination tariffs are a lawful means to achieve that end. The Commission should further establish consistency in its rules by affirming that rural ILECs are entitled to acess charges from IXCs that are involved in the routing of any call between a rural LEC and a CMRS provider.

Respectfully submitted,

THE ORGANIZATION FOR THE PROMOTION AND ADVANCEMENT OF SMALL TELECOMMUNICATIONS COMPANIES

By: /s/ Stuart Polikoff
Stuart Polikoff
Director of Government Relations

By: /s/ Stephen Pastorkovich
Stephen Pastorkovich
Business Development Director/
Senior Policy Analyst

21 Dupont Circle, NW
Suite 700
Washington, DC 20036
(202) 659-5990

October 18, 2002

CERTIFICATE OF SERVICE

I, Stephen Pastorkovich, hereby certify that a copy of the reply comments by the Organization for the Promotion and Advancement of Small Telecommunications Companies was sent by first class United States mail, postage prepaid, on this, the 18th day of October, 2002, to those listed on the attached sheet.

By: /s/ Stephen Pastorkovich
Stephen Pastorkovich

SERVICE LIST
CC Docket No. 01-92
DA 02-2436

Gene DeJordy
Western Wireless Corp.
3650 131st Avenue SE, Suite 400
Bellevue, WA 98006

Leonard Kennedy
Joel Margolis
Nextel Communications, Inc.
2001 Edmund Halley Drive
Reston, VA 20191

Brent Eilefson
Nextel Partners, Inc.
10120 W. 76th Street
Eden Prairie, MN 55344

Brian O'Connor
Harold Salters
T-Mobile USA, Inc.
401 9th Street NW, Suite 550
Washington, DC 20004

Greg Tedesco
T-Mobile USA, Inc.
2380 Bisso Drive, Suite 115
Concord, CA 94520-4821

Dan Menser
T-Mobile USA, Inc.
12920 SE 38th Street
Bellevue, WA 98006

Wanda Montano
US LEC Corp.
6801 Morrison Boulevard
Charlotte, NC 28211

Richard Rindler
Patrick Donovan
Harisha Bastiampillai
Swindler Berlin Shereff Friedman, LLP
3000 K Street, NW, Suite 300
Washington, DC 20007

Chief, Pricing Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Chief, Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

VIA E-MAIL

Qualex International
qualexint@aol.com